MBf Capital Bhd & Anor v Tommy Thomas & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-23-52 OF 1996
KAMALANATHAN RATNAM JC
23 JULY 1997

***Civil Procedure** — Trial — Preliminary issue — Whether issue as to whether applicant was a partner in the firm ought to be tried as a preliminary issue — Whether appropriate to have a 'trial within a trial' to determine the issue — Rules of the High Court 1980 O 77 r 4*

The plaintiffs, a public-listed company and a licensed stock-broking company respectively, sued the first defendant, an advocate and solicitor of the High Court of Malaya and a partner in the second defendant, a firm of advocates and solicitors. The claim was for damages including exemplary damages for slander and libel — words which were uttered by the first defendant, acting on behalf of himself and/or the second defendant, to one David Samuels, a representative of the International Commercial Litigation magazine ('the magazine'). The words were subsequently published in the magazine which was distributed in Malaysia.

When the second defendant was served with the writ, one of the partners, Dato Ranita bte Mohd Hussein ('the applicant'), applied by way of an application to set aside the service of the writ of summons on the basis that she was not a partner of the second defendant at the material time. The applicant averred that as she was admitted as a partner of the second defendant on 1 October 1995, she could not have therefore authorized the first defendant to speak to David Samuels nor could she be vicariously liable for anything to have been said by the first defendant. She argued that the issue as to whether she was a partner in the second defendant at the time of the accrual of the cause of action ought to be directed to be tried as a preliminary issue.

In reply, the president-legal of the plaintiffs averred that the magazine containing the defamatory words was published in November 1995 and thereafter distributed in Malaysia on or about November/December 1995, by which time the applicant was already a partner of the second defendant and hence, was vicariously liable for the publication of the defamatory words. He also averred that the issue as to whether the applicant was liable as a partner at the time of the accrual of the alleged cause of action related to matters of evidence which ought to be determined at the full trial of the action.

Held, dismissing the application with costs:

(1) Where a partner denies that she was a partner at the material time, then pursuant to O 77 r 4 of the Rules of the High Court 1980, her liability or that of her firm may be tried in such manner and at such time as the court directs — which means that the court has a discretionary power to evaluate the material facts before it and to make a decision (see p 400F–G).

(2) Based on the facts of the case, the issue as to whether the applicant was a partner at the material time when the cause of action accrued ought to be decided at the full trial of the suit and it was inappropriate to have a 'trial within a trial' to determine the issue (see p 401E–F).

[Bahasa Malaysia summary

Plaintif-plaintif, iaitu sebuah syarikat awam dan sebuah syarikat broker saham berlesen masing-masing, telah mendakwa defendan pertama, seorang peguamcara dan peguambela Mahkamah Tinggi Malaya dan seorang rakan kongsi dalam defendan kedua, suatu firma peguamcara dan peguambela. Tuntutannya adalah untuk ganti rugi termasuk gant irugi teladan untuk slander dan libel — perkataan-perkataan yang disebutkan oleh defendan pertama, yang bertindak bagi pihaknya sendiri dan/atau defendan kedua, kepada seorang bernama David Samuels, seorang wakil majalah 'International Commercial Litigation' ('majalah tersebut'). Perkataan-perkataan tersebut kemudiannya diterbitkan dalam majalah tersebut yang telah diedarkan di Malaysia.

Apabila defendan kedua disampaikan dengan writ, salah seorang dari rakan kongsinya, Dato Ranita bte Mohd Hussein ('pemohon') telah memohon melalui permohonan untuk membatalkan penyampaian writ saman atas dasar bahawa dia bukannya seorang rakan kongsi defendan kedua pada masa yang material. Pemohon telah menyatakan bahawa oleh kerana dia telah diterima sebagai rakan kongsi defendan kedua pada 1 Oktober 1995, dia tidak mungkin dapat memberikuasa kepada defendan pertama untuk berbual dengan David Samuels dan dia adalah tidak bertanggungan secara vikarius untuk apa-apa yang dikatakan oleh defendan pertama. Dia telah berhujah bahawa isu sama ada dia adalah seorang rakan kongsi dalam defendan kedua pada masa kausa tindakan terakru harus diarahkan supaya ianya dibicarakan sebagai isu permulaan.

Sebagai jawapan, presiden undang-undang plaintif-plaintif telah menyatakan bahawa majalah tersebut yang mengandungi perkataan-perkataan fitnah telah diterbitkan dalam bulan November 1995 dan setelah itu ianya diedarkan di Malaysia pada ataupun sekitar bulan November/Disember 1995, yang pada masa itu pemohon telahpun menjadi rakan kongsi defendan kedua dan oleh itu adalah bertangungan secara vikarius untuk penerbitan perkataan-perkataan fitnah itu. Dia juga telah menyatakan bahawa isu sama ada pemohon adalah bertanggungan sebagai rakan kongsi pada masa terakrunya kausa tindakan adalah berkenaan dengan isu-isu keterangan yang harus diputuskan di perbicaraan penuh tindakan tersebut.

Diputuskan, menolak permohonan dengan kos:

(1) Di mana seseorang rakan kongsi menafikan bahawa dia adalah rakan kongsi pada masa yang material, maka menurut A 77 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980, tanggungannya

ataupun tanggungan firmanya boleh dibicarakan dalam cara dan pada masa seperti yang diarahkan oleh mahkamah — yang bermakna bahawa mahkamah mempunyai kuasa budi bicara untuk menilaikan fakta-fakta yang material di hadapannya bagi membuat suatu keputusan (lihat ms 400F–G).

(2) Berdasarkan fakta-fakta kes, isu sama ada pemohon merupakan rakan kongsi pada masa yang material apabila kausa tindakan terakru harus diputuskan di perbicaraan penuh guaman dan ianya adalah tidak wajar untuk mengadakan 'perbicaraan dalam perbicaraan' bagi memutuskan isu tersebut (lihat ms 401E–F).]

Notes

For cases on preliminary issue, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3610–3617.

Cases referred to

Chan Kum Loong v Hii Sui Eng [1980] 1 MLJ 313 (refd)
Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57 (refd)
New Acres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474 (refd)

Legislation referred to

Partnership Act 1961 ss 7, 12
Rules of the High Court 1980 O 32 r 10, O 77

V Sivaparanjothi (*R Thayalan* with him) (*V Siva & Partners*) for the plaintiffs.
RS Nathan (*Shearn Delamore & Co*) for the applicant.

Cur Adv Vult

Kamalanathan Ratnam JC:

The cause of action

In this suit, the plaintiffs — being a public listed company and a licensed stockbroking company respectively — sued the first defendant, an advocate and solicitor of the High Court of Malaya and a partner in the second defendant, a long established firm of advocates and solicitors in Malaysia. The claim was for damages including exemplary damages for slander uttered by the first defendant — acting on behalf of himself and/or the second defendant — in or about September to November 1995 to representatives of the International Commercial Litigation Magazine ('the magazine'), namely to one David Samuels — the words being subsequently republished in the issue of that journal for November 1995 which was distributed in Malaysia. There was also included a claim for damages including exemplary damages for libel in respect of the words so republished and attributed to the first and second defendants in an article under the

heading 'Malaysian Justice on Trial' contained in the issue of the journal for November 1995 which was distributed in Malaysia. There were also prayers for an injunction against the defendants and for costs.

Application by one of the partners

When the second defendant was served with the writ, one of the partners in the second defendant, namely Dato' Ranita bte Mohd Hussein ('the applicant') applied by way of an application (encl 9) for the following orders:

1 that service of the writ of summons on Dato' Ranita be set aside;

2 alternatively, that an issue whether Dato' Ranita was a partner in the second defendant at the time of the accrual of the alleged cause of action herein may be directed to be tried as a preliminary issue; and

3 that the costs of this application be costs in the cause.

The basis for her application was that she was not a partner in the second defendant at any material time. At the commencement of the hearing of the application, Mr RS Nathan for the applicant, informed the court that he was seeking no order under prayer 1.

The applicant's case

In support of her application, the applicant averred that she became a partner in the second defendant as of 1 October 1995. She then referred to the statement of claim which stated that the alleged slander was published between September to November 1995 and that the alleged libel, through the republication of the alleged slander, was published in November 1995. She stated that the first defendant had informed her that he spoke to one David Samuels, a staff writer of the said magazine, on several occasions in the month of September 1995 and at no other time. She was admitted as a partner in the second defendant on 1 October 1995. She could not therefore have authorized the first defendant to speak to David Samuels nor could she be vicariously liable for anything said by the first defendant which was alleged to have been said in the usual course of the business of the second defendant, even if such were true. She further stated that neither could she have authorized, caused or participated in the alleged republication of the words spoken by the first defendant in the article entitled 'Malaysian Justice on Trial' in the said magazine in November 1995. She then argued that the issue as to whether she was a partner in the second defendant, at the time of the accrual of the alleged cause of action herein, ought to be directed to be tried as a preliminary issue. The first defendant also affirmed an affidavit (encl 25) in which he confirmed that he spoke over the telephone to David Samuels several times in September 1995, and not anytime after September 1995.

The respondents' case

In reply, one Patrick Chen Yee Ching, the president-legal of the plaintiffs filed an affidavit (encl 23) in which he averred that the magazine containing the defamatory words was published in November 1995 and thereafter distributed in Malaysia on or about November or December 1995 by

which time the applicant was already a partner in the second defendant and hence, was vicariously liable for the publication of the defamatory words. He also averred that the issue as to whether the applicant was liable as a partner at the time of the accrual of the alleged cause of action related to matters of evidence which ought to be determined at the full trial of the action. In reply, the applicant affirmed an affidavit (encl 27) in which she stated that since the alleged conversation between the first defendant and David Samuels occurred well before she became a partner on 1 October 1995, she could not be held liable for any such publication. She also exhibited an affidavit filed by another partner, Anantham Kasinather, who had averred in his affidavit that he believed the first defendant had spoken to David Samuels in September 1995 and not in October 1995. He also stated that he had only spoken once to David Samuels and that was in September 1995 and not in October 1995.

The court's findings

Order 77 r 4(2) of the Rules of the High Court 1980 ('the RHC') reads:

> (2) Where in an action against a firm the writ by which the action is begun is served on a person as a partner, that person, if he denies that he was a partner or liable as such at any material time, may enter an appearance in the action and state in the memorandum of appearance that he does so as a person served as a partner in the defendant firm but who denies that he was a partner at any material time.

Order 77 r 4(4) of the RHC reads:

> (4) The court may at any stage of the proceedings in an action in which a defendant has entered an appearance in accordance with para (2), on the application of the plaintiff or of that defendant, order that any question as to the liability of that defendant or as to the liability of the defendant firm be tried in such manner and at such time as the court directs.

In the circumstances, this application for an order that the issue whether the applicant was a partner in the second defendant at the time of the accrual of the alleged cause of action herein may be directed to be tried as a preliminary issue, was correctly made.

Further by consent, the parties had moved for this application to be heard before the learned judge pursuant to O 32 r 10 of the RHC rather than by the deputy registrar.

Mr Nathan for the applicant, argued that the plaintiffs were in no position to contradict the averment of the first defendant where he had affirmed that he had only spoken to David Samuels in September 1995. Relying on *Lindley & Banks on Partnership* (17th Ed, 1995), Mr Nathan submitted that an incoming partner was not liable for any act or liability done or incurred prior to the date of admission. He argued that in so far as the plaintiffs' cause of action was based on slander, such slander must have occurred in September 1995 — according to the affidavit of the first defendant and since his client was then not a partner in the second defendant, she could not be liable for the alleged slander. He pointed out that in its defence, the second defendant had denied that the first defendant

had any actual authority to speak to David Samuels. Whether the first defendant had any *implied* authority of the second defendant was irrelevant because at the time he spoke, the applicant was not a partner. He argued that *implied* authority cannot *ex hypothesi* bind someone prospectively.

In so far as the plaintiffs' cause of action against the second defendant was based on libel, the libel was the republication in written form of the statements attributed to the first defendant in the article in the magazine in November 1995. By this time, no doubt the applicant was already a partner in the second defendant, having joined on 1 October 1995. He pointed out that the second defendant was not the alleged primary publisher in so far as the republication was concerned. The magazine was published by Euromoney Publication. He further argued that under the laws of defamation, since the second defendant was not the primary publisher, the plaintiffs had to show that the second defendant had participated in or authorized the publication of the first defendant's alleged statements in the magazine in November 1995. He pointed out that there was no evidence whatsoever of actual authorization or participation by the partners in the second defendant. Since the burden of proof in relation to this issue was squarely on the plaintiffs, he submitted that the applicant was completely absolved even if publication of the article took place after 1 October 1995.

In reply, Dato' V Siva for the plaintiffs, argued that the applicant, despite being put on notice by the plaintiffs' solicitors' letter of demand dated 26 February 1996, had nonetheless failed and refused to immediately notify the publishers of the magazine in question of her complaint of wrong attribution or her contention that the words were published without her knowledge, authority or approval or to call for an immediate correction and apology to be published.

To my mind, the application made pursuant to O 77 r 4(4) of the RHC is to be read together with O 77 r 4(2) in that where a partner denies that she was a partner at the material time, then pursuant to O 77 r 4(4), her liability or that of her firm may be tried in such manner and at such time as the court directs. In other words, this was a discretionary power given to the trial judge to evaluate the material facts before him and to make a decision. The applicant had indeed filed a substantial and lengthy defence. Further, no where in either of her two affidavits had she exhibited any documentary evidence to support her contention that she became a partner in the second defendant on 1 October 1995. The plaintiffs' case was that the first defendant spoke the defamatory words to David Samuels between September to November 1995. Though the first defendant had affirmed an affidavit that he only spoke in the month of September 1995, this contention could only be ascertained at the full trial of this suit through the evidence of the first defendant and David Samuels, to name just the two. Although I am not unmindful of the fact that for the purposes of this application there was no necessity for me to make any findings of fact because what was before the court was a request to direct a hearing at which these facts could be tried, yet I could not overlook the principle that even for the purposes of this application, I have to look at the facts before me. The question of deciding the applicant's liability, if I allow this

A application, would mean having a trial within a trial because that is what it amounts to. If this application was allowed, then this court would fix a date on which the issue of the applicant's liability as a partner would be tried. To a question by me, Mr Nathan in his usual candid manner, readily conceded that oral — and not affidavit evidence — would be adduced. I then referred Mr Nathan to the decision of the Court of Appeal in
B *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 wherein Gopal Sri Ram JCA said at p 65:

> Although that was a decision made on an interlocutory matter which was purely procedural in nature, it was nevertheless binding on the court and on all parties to the *lis* until its reversal on appeal.

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Again at p 66, his Lordship said:

> We cannot over emphasize the proposition that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly.

D Confronted with this authority, Mr Nathan readily conceded that his client could not relitigate any of these issues at the main trial of the action if the court was minded to dismiss the application. In *New Acres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474, the (then) Supreme Court held that where there were several issues which must be proved by extrinsic
E evidence, those matters ought to be tried at the trial proper. Having weighed all the factors and in the exercise of my discretion, it is my judgment that the issue as to whether the applicant was a partner at the material time when the cause of action accrued, in any event, ought to be decided at the full trial of the suit — and that it was inappropriate to have a
F 'trial within a trial' to determine the issue as to whether she was a partner at the material time. The word 'liability' as stated in O 77 r 4(4) to my mind did not mean the determination of her liability per se towards the main cause of action. Since O 77 r 4(4) is to be read with O 77 r 4(2), the words 'liability' is to determine the issue whether at the material time she was a partner.

G By virtue of s 7 of the Partnership Act 1961 ('the Act'), an act of one partner for the carrying on in the usual way of business of the kind carried on by the firm will bind his co-partners. By virtue of s 12 of the Act, where any wrongful act done by one partner in the ordinary course of business of the firm (or with the authority of the co-partners) has caused injury or loss, the firm is liable to the same extent as that of the partner. Section 14 of the
H Act provides that every partner is liable jointly and severally for everything which the firm becomes liable for under s 12. To rely on these various sections, the parties have to clearly, and as rightly conceded by Mr Nathan, adduce oral evidence.

The applicant ought not to look a gift horse in the mouth when this
I court dismissed this application because based on *Hartecon v Hartela*, the applicant would be estopped from raising any issues at the full trial which she would have already exhausted at the 'trial within a trial' stage. In fact, in *Chan Kum Loong v Hii Sui Eng* [1980] 1 MLJ 313, Chang Min Tat FJ said at p 314:

> In the ordinary course of events, a preliminary point of law which does not decide the matter between the parties one way or the other is an unjustified waste of time and occasions an equally unjustified increase in costs. Preliminary points of law have been described as too often treacherous short cuts and their price can be delay, anxiety and expense (see *Tilling v Whiteman* [1979] 2 WLR 401, per Lord Wilberforce at p 403 D–G and per Lord Scarman at p 410 C–E). But where it is a trial of so-called preliminary issues of fact, the justification is even harder to see ... .
>
> We think it should be said with some emphasis that counsel owe a plain duty to the court for it to function expeditiously, economically and satisfactorily. They must therefore so conduct their case as to enable the court to come to a quick and early decision. The court must also be chary of short-cuts and not be tempted to undertake any course except the one for a proper, expeditious and economical trial on the issues raised in the action.

I must add that this was not a case that must be delayed by trial of preliminary issues. The first plaintiff is a public-listed company whilst the second plaintiff is a stock-broking company. The first defendant is a senior member of the Malaysian Bar and was its secretary. The second defendant is a long established firm of solicitors in Malaysia. It is for the best interest of all parties concerned that this case is concluded expeditiously. Useful as the argument that preliminary issues can be, when their determination can effectively be foreseen as conclusive of the entire cause of action in which such preliminary issues arise, it is the duty of the court to exercise judicial discretion with great care in the selection of the proper cases where such procedures ought to be allowed. Otherwise, the intended purpose of short-circuiting proceedings by trying preliminary issues would inevitably produce the contrary effect of prolonged litigation and build-up of costs.

I therefore had no hesitation in dismissing this application with costs.

Application dismissed.

Reported by Mariette Peters-Goh